Date: September 10, 1997

Case No.: 96-INA-56

In the Matter of:

SHIN SAPPORO, INC., d/b/a IROHA JAPANESE RESTAURANT,
Employer

On Behalf Of:

URARA TOKUOKA,
Alien

Appearance: Seymour Steinberg, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On December 30, 1993, Iroha Japanese Restaurant ("Employer") filed an application for labor certification to enable Urara Tokuoka ("Alien") to fill the position of Assistant Restaurant Manager (AF 10-11). The job duties for the position are:

> Supervise employees; order and check provisions for quality and freshness; handle telephone reservations and special arrangements for private parties; total cash register receipts at closing time; handle complaints of food and service.

The requirements for the position are two years of experience in the job offered. In addition, the Employer is requiring that applicants be bilingual in Japanese and English in order to communicate with employees from Japan.

The CO issued a Notice of Findings on June 13, 1995 (AF 65-67). The CO proposed to deny labor certification pursuant to § 656.21(b)(5). Specifically, the CO found that the Alien gained his qualifying experience while working for an entity with the same President as the Employer. As such, the CO instructed the Employer to delete the requirement or show that the Alien gained his experience with a different employer or show that it is currently infeasible to train another individual.

Accordingly, the Employer was notified that it had until July 18, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated July 7, 1995 (AF 68-75), the Employer stated that the restaurant where the Alien gained his qualifying experience and the current Employer are separate entities with different employees. To support this argument, the Employer submitted the Payroll Register for each restaurant for the week of June 26, 1995.

The CO issued the Final Determination on July 20, 1995 (AF 76-77), denying certification because the Employer failed to establish that the Alien gained his qualifying experience with a different employer pursuant to § 656.21(b)(5).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Discussion

Section 656.21(b)(5) requires an employer to document either: (1) that the requirements it specifies for a job opportunity are its actual minimum requirements and the employer has not hired workers with less training or experience for jobs similar to the one offered; or, (2) that it is not feasible to hire workers with less training or experience than that required by the job offer. Thus, an employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant,* 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.,* 90-INA-184 (Dec. 19, 1991); *Gerson Industries,* 90-INA-190 (Dec. 19, 1991). The purpose of this section is to prevent employers from requiring more stringent qualifications of a U.S. worker than it requires of the alien. The employer may not treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn,* 89-INA-105 (Feb. 14, 1990).

In this case, the CO, in accordance with § 656.21(b)(5), instructed the Employer to document that its requirement for two years of experience in the job offered represents the Employer's actual minimum requirements for the job opportunity (AF 65-66). Specifically, the CO noted that the entity with which the Alien gained his qualifying experience and the current Employer both have the same President. As such, the CO questioned whether the Alien gained his experience while employed by a different employer. Accordingly, the CO instructed the Employer to delete the experience requirement or to provide evidence that the Alien gained two years of experience with a different employer or to provide evidence that it is not now feasible to hire an individual with less than two years of experience.

In rebuttal, the Employer argued that the Alien gained his experience with a separate entity. Specifically, the Employer stated the employees for each restaurant are different (AF 74). In support of this contention, the Employer submitted the Payroll Register for each restaurant (AF 68-73). The Employer further stated that each restaurant was incorporated at different times.[2]

In order to prove that the alien gained his qualifying experience with a different employer, the employer must demonstrate that its ownership and control are separate and distinct from the company where the alien gained his qualifying experience. *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 90-INA-200 (May 23, 1991). Even if the companies are not owned or controlled by the same individuals, the employer may have to show a "distinct operational independence" between the two entities. *Obro Ltd.*, 90-INA-51 (Feb. 21, 1991) (employer may not play "musical employees" to bypass labor certification requirements). In this case, we find that the Employer has not demonstrated that the Alien acquired his alleged experience while working for a separate entity.

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[2] We note that the Employer submitted additional evidence in conjunction with its Request for Review. However, it is well-settled that evidence first submitted with the Request for Review will not be considered by the Board. See *Cappriccio's Restaurant,* 90-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 90-INA-101 (May 20, 1991); *Kogan & Moore Architects, Inc.*, 90-INA-466 (May 10, 1991). The CO clearly presented the issues in the NOF and, therefore, the Employer had every opportunity to submit this information in conjunction with its Rebuttal.

We note that the Employer has submitted the Payroll Register only for the week of June 26, 1995 (AF 68-73). Although the payrolls indicate that each restaurant had separate employees for that week, the Employer has not established that this is always the case. Moreover, even if the two restaurants do have separate payrolls, the fact remains that the same individual is the President of both corporations (AF 17, 31). Therefore, the same individual has ultimate control over both entities. In a similar case, a Panel of the Board found that two restaurants with "virtually identical" corporate shareholders and officers were the same employer. *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc., supra.* As such, we find that the Employer has not met his burden of establishing that the Alien gained his experience with a different employer. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.